

EXHIBIT H
Public Interest Energy Research (PIER) Subcontract Flow-Down Provisions

The following language must be included in all subcontracts executed by PIER contractors. This language is the minimum that must be contained in subcontracts. Contractor may include other provisions as well. Contractor should use this template and fill in the name of the Contractor and Subcontractor as appropriate in each place where there is a _____ blank.

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This Agreement is funded by or funded in part by the California Energy Commission (Energy Commission) Public Interest Energy Research (PIER) Program. _____ [Contractor] entered into a prime contract with the Energy Commission. This Agreement between _____ [Contractor] and _____ [Subcontractor] is a subcontract to the prime contract.

1. STANDARD OF PERFORMANCE

_____ [Subcontractor] shall be responsible in the performance of _____'s [Subcontractor] work under this Agreement for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in scientific and engineering research fields. Any costs for failure to meet these standards, or otherwise defective services, which require re-performance, as directed by _____ [Contractor], shall be borne in total by the _____ [Subcontractor] and not the Energy Commission or _____ [Contractor]. In the event the _____ [Subcontractor] fails to perform in accordance with the above standard the following will apply:

- A. _____ [Subcontractor] will re-perform, at its own expense, any task, that was not performed to the reasonable satisfaction of _____ [Contractor]. Any work re-performed pursuant to this clause shall be completed within the time limitations originally set forth for the specific task involved. _____ [Subcontractor] shall work any overtime required to meet the deadline for the task at no additional cost to _____ [Contractor].
- B. _____ [Contractor] shall provide a new schedule for the re-performance of any task pursuant to this clause in the event that re-performance of a task within the original time limitations is not feasible.
- C. In the event _____ [Subcontractor] fails to perform in accordance with the foregoing standard of performance, _____ [Contractor] and _____ [Subcontractor] shall seek to negotiate in good faith an equitable resolution satisfactory to both parties.

2. RECORDKEEPING, COST ACCOUNTING AND AUDITING

- A. Recordkeeping. _____ [Subcontractor] shall maintain all records, documents or other evidence relating to direct and indirect expenses reimbursed to _____ [Subcontractor] hereunder, and to hours of employment on this Agreement by all employees of _____ [Subcontractor] for which _____ [Contractor] is billed. These records shall be sufficient to reflect all costs claimed to have been incurred in performing this Agreement.
- B. Accounting Procedures. _____'s [Subcontractor] costs shall be determined on the basis of the _____'s [Subcontractor] accounting system procedures and practices employed as of the effective date of this Agreement. _____'s [Subcontractor] accounting system shall distinguish between direct costs and indirect costs. All costs incurred for the same purpose,

in like circumstances, are either direct costs only or indirect costs only with respect to costs incurred under this Agreement.

C. Allowability of Costs.

- 1) Allowable Costs. Allowable costs may include all costs, direct and indirect, incurred in the performance of work and capped as identified in the budget for this Agreement. Costs must be incurred within the term of the Agreement. Factors to be considered in determining whether an individual item of cost is allowable include (i) reasonableness of the item, (ii) allowability of the item to the work, and (iii) the terms and conditions of this Agreement.
- 2) Unallowable Costs. Some examples of unallowable costs include: contingency costs, imputed costs, fines and penalties, losses on contracts, excess profit taxes, and increased contract rates and fees for this Agreement.

3. **AUDIT**

_____ [Subcontractor] agrees that the Energy Commission, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. _____ [Subcontractor] agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. _____ [Subcontractor] agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, _____ [Subcontractor] agrees to include a similar right of the State to audit records and interview staff in any subcontract between _____ [Subcontractor] and a third party related to performance of this Agreement (“lower tier subcontracts”).

4. **PURCHASE OF EQUIPMENT**

If equipment is purchased with Energy Commission funds, the following applies:

- A. Equipment is defined as having a useful life of at least one year, having an acquisition unit cost of at least \$5,000, and purchased with Energy Commission funds. Equipment means any products, objects, machinery, apparatus, implements or tools purchased, used or constructed within the Project, including those products, objects, machinery, apparatus, implements or tools from which over thirty percent (30%) of the equipment is composed of materials purchased for the Project. For purposes of determining depreciated value of equipment used in the Agreement, the Project shall terminate at the end of the normal useful life of the equipment purchased, funded and/or developed with Energy Commission funds. The Energy Commission may determine the normal useful life of such equipment.
- B. Materials means the substances used in constructing a finished object, commodity, device, article or product.
- C. Title to all non-expendable equipment purchased in part or in whole with Energy Commission funds shall remain with the Energy Commission. The Energy Commission will complete and file a UCC.1 with the Secretary of State’s Office for all such equipment.
- D. _____ [Subcontractor] shall assume all risk for maintenance, repair, destruction and damage to equipment while in the possession or subject to the control of _____ [Subcontractor].

_____ [Subcontractor] is not expected to repair or replace equipment that is intended to undergo significant modification or testing to the point of damage/destruction.

E. Upon termination of this Agreement, the Energy Commission may:

- 1) if requested by _____ [Contractor], authorize _____'s [Subcontractor] continued use of such equipment to further energy research in the public interest,
- 2) by mutual agreement with _____ [Contractor], allow _____ [Subcontractor] to purchase such equipment for an amount not to exceed the residual value of the equipment as of the date of termination of this Agreement, or
- 3) request that such equipment be delivered to the Energy Commission with any costs incurred for such return to be borne by the Energy Commission.

5. **RIGHTS OF PARTIES REGARDING DELIVERABLES, DATA & INTELLECTUAL PROPERTY**

A. Energy Commission's Rights in Deliverables

Deliverables and reports specified for delivery to the _____ [Contractor] for the Energy Commission's use under this Agreement shall become the property of the Energy Commission. The Energy Commission may use, publish, and reproduce the deliverables and reports subject to the provisions of clause 6 below.

B. Rights in Technical, Generated, and Deliverable Data

- 1) _____'s [Subcontractor's] Rights. All technical, generated and deliverable data produced under this Agreement shall be limited by the license retained by the Energy Commission in 2) below, and the rights the Energy Commission has in deliverables specified above in A).
- 2) Energy Commission's Rights. _____ [Subcontractor] shall provide Energy Commission Contract Manager (through _____ [Contractor]), with a copy of all technical, generated and deliverable data produced under this Agreement when requested by the Energy Commission. _____ [Subcontractor] is not required to copy and submit data the Energy Commission Contract Manager has identified as being unusable to the Energy Commission and the PIER program such as raw data that is too disaggregated or voluminous for practical application. Such Data shall be retained at _____'s [Subcontractor's] facility for inspection, review and possible copying by the Contract Manager for a minimum of three (3) years after final payment unless a longer period of records retention is stipulated.

Upon request by Contractor or Contract Manager, _____ [Subcontractor] shall provide the Energy Commission Contract Manager and any designated reviewer(s), access to review technical and generated data produced in the course of this Agreement that is not requested to be a deliverable.

For all technical, generated and deliverable data produced under this Agreement, the Energy Commission retains a no-cost, non-exclusive, non-transferable, irrevocable, royalty-free, worldwide, perpetual license to use, publish, translate, produce and to

authorize others to produce, translate, publish and use the data, subject to the provisions of clause 6 below.

- C. Exclusive Remedy. In the event the Energy Commission intends to publish or has disclosed data _____ [Subcontractor] considers confidential, _____'s [Subcontractor's] exclusive remedy is a civil court action for injunctive relief. Such court action shall be filed in Sacramento County, Sacramento, California.
- D. Waiver of Consequential Damages.

IN NO EVENT WILL THE ENERGY COMMISSION BE LIABLE FOR ANY SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BASED ON BREACH OF WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT TORT, OR ANY OTHER LEGAL THEORY FOR THE DISCLOSURE OF _____'s [SUBCONTRACTOR'S] CONFIDENTIAL RECORDS, EVEN IF THE ENERGY COMMISSION HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. DAMAGES THAT THE ENERGY COMMISSION WILL NOT BE RESPONSIBLE FOR INCLUDE, BUT ARE NOT LIMITED TO, LOSS OF PROFIT; LOSS OF SAVINGS OR REVENUE; LOSS OF GOODWILL; LOSS OF USE OF THE PRODUCT OR ANY ASSOCIATED EQUIPMENT; COST OF CAPITAL; COST OF ANY SUBSTITUTE EQUIPMENT, FACILITIES, OR SERVICES; DOWNTIME; THE CLAIMS OF THIRD PARTIES INCLUDING CUSTOMERS; AND INJURY TO PROPERTY.

- E. Proprietary Data. Proprietary data owned by _____ [Subcontractor] shall remain with _____ [Subcontractor] throughout the term of this Agreement and thereafter. The extent of _____ [Contractor] or the Energy Commission access to the same and the testimony available regarding the same shall be limited to that reasonably necessary to demonstrate, in a scientific manner to the satisfaction of scientific persons, the validity of any premise, postulate or conclusion referred to or expressed in any deliverable hereunder. Upon request by _____ [Contractor] or the Energy Commission Contract Manager, _____ [Subcontractor] shall provide the Energy Commission Contract Manager and any designated reviewer(s) access to review _____ [Subcontractor's] proprietary data produced in the course of this Agreement that is not requested to be a deliverable. Neither _____ [Contractor] nor the Energy Commission shall disclose any _____'s [Subcontractor] proprietary data access or reviewed to any third party.
- F. Preservation of Data. Any data that is reserved to _____ [Subcontractor] by the express terms hereof, and pre-existing proprietary or confidential data that have been utilized to support any premise, postulate or conclusion referred to or expressed in any deliverable hereunder, shall be preserved by _____ [Subcontractor] at _____'s [Subcontractor] own expense for a period of not less than three years after final payment, unless a longer period of records retention is stipulated.
- G. Destruction of Data. Before the expiration of three years or the stipulated records retention period and before changing the form of or destroying any technical, generated or deliverable data or trade secrets, _____ [Subcontractor] shall notify _____ [Contractor] of any such contemplated action and the Energy Commission may, within thirty (30) days after said notification, determine whether it desires said data to be further preserved. If the Energy Commission so elects, the expense of further preserving said data shall be paid for by the Energy Commission. _____ [Subcontractor] agrees that the Energy Commission may at its own expense, have reasonable access to said data throughout the time during which said

data is preserved. _____ [Subcontractor] agrees to use its best efforts to identify competent witnesses to testify in any court of law regarding said data or, at the Energy Commission's expense, to furnish such competent witnesses.

H. Patent Rights. Ownership of patent rights between ____ [Contractor] and _____ [Subcontractor] is not addressed in this paragraph. However, the Energy Commission retains certain patent rights in its prime contract with ____ [Contractor]. _____ [Subcontractor] acknowledges the following minimum Energy Commission patent rights for subject inventions: The Energy Commission retains a no-cost, nonexclusive, nontransferable, irrevocable, royalty-free, worldwide perpetual license to use or have practiced for or on behalf of the State of California subject invention(s) for governmental purposes. The owner of subject invention(s) must obtain agreements to effectuate this clause with all persons or entities, except for the U.S. Department of Energy (DOE), obtaining ownership interest in the patented subject invention(s). Previously documented (whether patented or unpatented under the patent laws of the United States of America or any foreign country) inventions are exempt from this provision.

I. March-In Rights. If _____ [Subcontractor] is the owner of a subject invention, _____ [Subcontractor] shall forfeit and assign to the Energy Commission, at the Energy Commission's request, all rights on a subject invention if either: 1) _____ [Subcontractor] fails to apply for a patent on subject inventions(s) developed under this Agreement within six months of conceiving or first actually reducing to practice the technology; or 2) _____ [Subcontractor] or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention. In this event, _____ [Subcontractor] agrees to relinquish all rights, subject to DOE reserved rights, on the subject invention to the Energy Commission. The Energy Commission will have the unfettered right to use and/or dispose of the rights in whatever manner it deems most suitable to help transfer the technology into the market place, including but not limited to, seeking patent protection, or licensing the invention.

J. Energy Commission's Rights to Invention. _____ [Subcontractor] and all persons and/or entities obtaining an ownership interest in subject invention(s) shall include within the specification of any United States patent application, and any patent issuing thereon covering a subject invention, the following statement:

THIS INVENTION WAS MADE WITH STATE OF CALIFORNIA SUPPORT UNDER CALIFORNIA ENERGY COMMISSION AGREEMENT NUMBER _____. THE ENERGY COMMISSION HAS CERTAIN RIGHTS TO THIS INVENTION.

K. Energy Commission's Interest in Inventions. If _____ [Subcontractor] perfects a patent application on any subject invention, _____ [Subcontractor] shall notify Contractor in order for the Energy Commission to prepare and file a Uniform Commercial Code (UCC.1) Financing Statement with the Secretary of State's Office.

L. Copyrights.

1) If _____ [Subcontractor] is the owner of a copyright, _____ [Subcontractor] agrees to grant the Energy Commission a royalty-free, no-cost nonexclusive, irrevocable, nontransferable worldwide, perpetual license to produce, translate, publish, use and dispose of, and to authorize others to produce, translate, publish, use and dispose of all copyrightable material first produced or composed in the performance of this Agreement.

- 2) _____ [Subcontractor] will apply copyright notices to all documents prepared for this Agreement that will be released to the public including reports, deliverables, articles submitted for publication and all reprints using the following form or such other form as may be reasonably specified by _____ [Contractor].

©[YEAR OF FIRST PUBLICATION OF DELIVERABLE],
[THE COPYRIGHT HOLDER'S NAME].
ALL RIGHTS RESERVED.

- 3) In the event ____ [Subcontractor] develops software that is not a deliverable under the Agreement, but is first produced or composed in the performance of the Agreement, and if ____ [Subcontractor] is the owner of the software, ____ [Subcontractor] shall grant the Energy Commission a royalty-free, no-cost, non-exclusive, irrevocable, non-transferable, worldwide, perpetual license to produce and use the software, its derivatives and upgrades for governmental purposes.

M. Intellectual Property Indemnity. _____ [Subcontractor] warrants that _____ [Subcontractor] will not, in its supplying of the work under this Agreement, knowingly infringe or misappropriate any intellectual property right of a third party, and that it will conduct a reasonable investigation of the intellectual property rights of third parties to avoid such infringement. _____ [Subcontractor] will defend and indemnify _____ [Contractor] and Energy Commission from and against any claim, lawsuit or other proceeding, loss, cost, liability or expense (including court costs and reasonable fees of attorneys and other professionals) to the extent arising out of: (i) any third party claim that a deliverable infringes any patent, copyright, trade secret or other intellectual property right of any third party, or (ii) any third party claim arising out of the negligent or other tortious act(s) or omission(s) by _____ [Subcontractor], its employees, lower tier subcontractors or agents, in connection with or related to the deliverables or the _____'s [Subcontractor's] performance thereof under this Agreement.

6. **LIMITATION ON DISCLOSURE OF INFORMATION**

- A. _____ [Subcontractor] must receive approval from _____ [Contractor] before disclosing to any third party the contents of any draft deliverable or report.
- B. After any document submitted has become a part of the public records of the State, _____ [Subcontractor] may, if it wishes to do so at its own expense, publish or utilize the same, and shall include the Legal and Copyright notices required above.
- C. In the event any public statement is made by the Energy Commission as to the role of _____[Subcontractor] or the content of any deliverable or report, ____ [Subcontractor] may, if it believes such statement to be incorrect, state publicly what it believes is correct.
- D. No record that is provided to _____ [Subcontractor] by the Energy Commission or ____ [Contractor] for _____'s [Subcontractor's] use in performing this Agreement and which has been designated as confidential information, or is the subject of a pending application for confidential designation, except as provided in Title 20, CCR Section 2505 and following (and amendments), shall be disclosed by _____ [Subcontractor], unless disclosure is ordered by a court of competent jurisdiction. At the election of _____ [Contractor] or the Energy Commission Contract Manager, ____ [Subcontractor], its employees and any lower tier

subcontractor shall execute a confidentiality agreement supplied by _____ [Contractor] or the Energy Commission.

- E. _____ [Subcontractor] acknowledges that each of its officers, employees, and lower tier subcontractors who are involved in the performance of this Agreement will be informed about these restrictions and be directed to abide by the above terms.
- F. Data provided to the Energy Commission by _____ [Subcontractor], which data the Energy Commission has not already agreed to keep confidential and which _____ [Subcontractor] seeks to have designated as confidential, or is the subject of a pending application for confidential designation, will not be disclosed by the Energy Commission except as provided in Title 20 CCR Sections 2506 and 2507 (and amendments), unless disclosure is ordered by a court of competent jurisdiction.

7. **NO FURTHER ASSIGNMENTS**

_____ [Subcontractor] shall not make any assignment of this Agreement to any third party without advance written consent of the _____ [Contractor].

8. **NON-DISCRIMINATION**

During the performance of this Agreement, _____ [Subcontractor] and any of its lower tier subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age (over 40), marital status, and denial of family care leave. _____ [Subcontractor] shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. _____ [Subcontractor] shall comply with the provisions of the Fair Employment and Housing Act (Government Code Section 12990 (a-f) et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 et seq.). The applicable regulations of the Fair Employment and Housing Energy Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Agreement by reference and made a part hereof as if set forth in full. _____ [Subcontractor] shall give written notice of its obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement. _____ [Subcontractor] shall include the nondiscrimination and compliance provisions of this clause in all subcontracts between _____ [Subcontractor] and a lower tier subcontractor to perform work under this Agreement.

9. **STOP WORK**

_____ [Contractor] may, at any time, by written notice to _____ [Subcontractor], require _____ [Subcontractor] to stop all or any part of the work tasks in this Agreement. Stop work orders may be issued for reasons such as a Project exceeding budget, standard of performance, out of scope work, delay in Project schedule, misrepresentations and the like.

- A. Compliance. Upon receipt of such stop work order, _____ [Subcontractor] shall immediately take all necessary steps to comply therewith and to minimize the incurrence of costs allocable to work stopped.
- B. Equitable Adjustment. An equitable adjustment shall be made by _____ [Contractor] based upon a written request by _____ [Subcontractor].

- C. Canceling a Stop Work Order. _____ [Subcontractor] shall resume the work only upon receipt of written instructions from the _____ [Contractor].

10. **TERMINATION**

[NOTE: SUBCONTRACT MUST CONTAIN TERMINATION RIGHTS OF THE CONTRACTOR SIMILAR TO THE CAUSE/FOR CAUSE OPTIONS BELOW. Contractor may use its own standard termination language as long as Contractor retains the right to terminate with and without cause. Contractor may use the language below if it does not have standard termination language. Contractor may add a right of Subcontractor to terminate, but Subcontractor's right to terminate is not encouraged, so sample language is not included here.]

This Agreement may be terminated as follows:

- A. In the event of breach by _____ [Subcontractor] of the conditions in this Agreement, _____ [Contractor] may, without prejudice to any of its legal remedies, terminate this Agreement for cause, upon five days written notice to _____ [Subcontractor].
- B. _____ [Contractor], may at its option, terminate this Agreement without cause, upon giving 30 days written notice to _____ [Subcontractor]. In such event, _____ [Subcontractor] agrees to use all reasonable efforts to mitigate its expenses and obligations under this Agreement.

11. **ACCESS TO SITES & RECORDS**

_____ [Contractor] and Energy Commission staff or its representatives shall have reasonable access to all Project sites and all records related to this Agreement. _____ [Subcontractor] shall ensure the same access rights for all lower tier subcontractors.

12. **CONFLICT OF INTEREST**

- A. Conflicts in General. _____ [Subcontractor] agrees to continuously review new and upcoming Projects in which members of the _____ [Subcontractor] team may be involved for potential conflicts of interest and report potential conflicts to _____ [Contractor].

NOTE: Section B applies to subcontracts under PIER Tech support contracts:

- B. Contracting.
- 1) Bidding Activities. _____ [Subcontractor] agrees not to bid as an independent consultant on the following:
 - a) A request for proposal (RFP) or Project on which _____ [Contractor] or _____ [Subcontractor] has provided assistance under this Agreement.
 - b) Every related RFP or subject that currently receives assistance or receives assistance during this Agreement under the PIER Program or intends to apply for such assistance under the PIER Program and makes that fact known to _____ [Contractor] or _____ [Subcontractor].
 - 2) Reviewing, Evaluation & Assistance Activities. _____ [Subcontractor] shall be disqualified from participating in the review, evaluation, or assistance of:

- a) Any Project seeking assistance under the PIER Program for which ____ [Subcontractor] has become an independent consultant in a situation not covered by 1) above; or,
 - b) Any Project for which, within twelve (12) months prior to the start date of this Agreement or at any time during this Agreement, ____ [Subcontractor] has provided assistance under a separate agreement to the Project proponent that is seeking assistance for the same Project under the PIER Program.
- 3) Lower Tier Subcontractors
____ [Subcontractor] shall require each of its lower tier subcontractors who will be involved in the performance of this Agreement to agree to the above terms. The terms of this paragraph shall remain in effect for the duration of this Agreement.

13. **LEGAL NOTICE**

All documents prepared for this Agreement that will be released to the public in hard copy, electronic or website format including but not limited to reports, deliverables, articles submitted for publication, and all reprints shall include the following:

LEGAL NOTICE

THIS REPORT WAS PREPARED AS A RESULT OF WORK SPONSORED BY THE CALIFORNIA ENERGY COMMISSION (ENERGY COMMISSION). IT DOES NOT NECESSARILY REPRESENT THE VIEWS OF THE ENERGY COMMISSION, ITS EMPLOYEES, OR THE STATE OF CALIFORNIA. THE ENERGY COMMISSION, THE STATE OF CALIFORNIA, ITS EMPLOYEES, CONTRACTORS, AND SUBCONTRACTORS MAKE NO WARRANTY, EXPRESS OR IMPLIED, AND ASSUME NO LEGAL LIABILITY FOR THE INFORMATION IN THIS REPORT; NOR DOES ANY PARTY REPRESENT THAT THE USE OF THIS INFORMATION WILL NOT INFRINGE UPON PRIVATELY OWNED RIGHTS. THIS REPORT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE ENERGY COMMISSION NOR HAS THE ENERGY COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION IN THIS REPORT.

14. **SURVIVAL**

It is understood and agreed that certain clauses shall survive completion or termination of this Agreement for any reason. The clauses include but are not limited to:

- Recordkeeping, Cost Accounting and Auditing
- Audit
- Purchase of Equipment
- Rights of Parties Regarding Deliverables, Data and Intellectual Property
- Access to Sites and Records